

Attorneys Who Succeed at Family Mediation

*All family professionals
share a common unseen client:
the future co-parenting relationship
between the parents*
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In over a decade of family mediation work, I've learned two things about attorneys' contribution to the process. First, whether or not they attend their clients' mediation, attorneys are more important to those clients' success or failure than is the mediator. The clients chose their attorneys, have spent many hours with them, and will spend many more hours with them long after mediation is concluded. Second, there are some specific common elements to capable attorneys' representation that promote their clients' chances of success at mediation.

This paper is my attempt to share some excellent family attorneys' secrets of mediation success.

I: Two Models of Advocacy

The best family attorneys carry a keen awareness that no single model of advocacy works best in all circumstances. The following schematic shows two models—and suggests why one almost always serves family mediation clients manifestly better than the other.

	View A (stranger model)	View B (family model)
1. The goal:	Victory <i>over</i> someone on a present known dispute—usually a dispute over whose rights and arguments are superior.	Victory <i>with</i> someone by providing for the current <i>and</i> future needs of the family members, often on many matters not presently knowable.
2. Temporal focus:	The past: Who did what? Said what? Spent what? Was responsible for what?	The future: How can parents create a new relationship to serve their best interests and those of their children?
3. Actual parties in interest:	The named parties; others (including children and grandparents) are relegated to the lowliest legal status: “nonparties.”	Everyone’s interests are vital—and in particular children’s. Named parties are helped to rally to meet everyone’s needs.
4. Relationship transformation:	Ending a relationship (e.g., parties with an accident or one-time commercial dispute will conclude their relationship when they reach a settlement).	The relationship will always matter; creating a new enduring relationship, often one focused on protecting the children and relationships in the family is the true goal.
5. Dominant strategy:	Exploiting division and fear to maximize one “side’s” financial or legal outcome.	Building a roadmap to conciliation, trust, and cooperation for everyone’s sake.

View A, the one subtitled the “stranger model,” may work well in a nonfamily setting. Legal battles over money or liability for a past event are often competitive. They tend naturally to carry elements of (1) a goal of victory over someone, (2) arguing and litigating past events, (3) focusing on the interests of the named parties, (4) ending disputes and relationships by declaring legal rights, and (5) at least during negotiation, pointing out to one’s adversaries how much they should fear defeat by litigation.

Conversely, View B, subtitled the “family model,” depicts the dramatically different tasks for the typical family in crisis or transition. Those families tend to carry challenges of (1) finding ways to help the newly configured family to work, (2) creating a partnership to succeed in the common tasks of protecting children and the future relationships in the family, (3) considering the interests of all family members, (4) creating a new successful relationship between the parties, and (5) replacing fear with conciliation, trust, and cooperation.

II: Appreciating Attorneys’ Role as Educators

All effective family professionals, but especially effective attorneys, appreciate that they play a key role as educators of parents. They know that parents in family cases often arrive with fatally flawed ideas about their legal and personal challenges. Many have gleaned their insights on family crises from sources no more nuanced than a co-worker mired in a decade-long divorce war of his or her own, a misinformed family member or jealous new mate, or *The Jerry Springer Show*.¹

“It’s easier to lead men to combat, stirring up their passions,
than it is to restrain them and direct them to the patient labors of peace.”
--André Gide

The very ideas of divorce as a call to cooperation and each parent’s self-interest in being supportive of the children’s relationship with the other parent will often require *sustained* client education. Indeed, at least the following major paradigm shifts may be essential to helping any client through a family crisis.

1. Maybe this isn’t a competition between us, but instead the ultimate call to cooperation.
2. Maybe our issues aren’t so much legal as personal, emotional, and parental.
3. Maybe our love for our children will be a better guide for us than our legal rights or litigation.

¹ A perennial and (I think) actually quite useful question is why so many people, including many otherwise brilliant and accomplished people choose the expensive, complicated, fearful, child-destructive, and client-destructive divorce over the economical, simple, self-determining, child-protective, and client-protective divorce. Part of the answer is that in America one of those divorces has a manifestly better marketing machine behind it. A key task of any good family professional (whether a mediator, attorney, judge, counselor, or otherwise) is to be an educator to parents about the better choice.

4. Maybe we have been so consumed with our own hurt and fear that our children's needs have become invisible to us.
5. Maybe our children are suffering as a result of our conflict—and in ways we haven't noticed.
6. Regardless of what they say to appease each of us, maybe what our children really want and need is a predictable, restrained, and courteous relationship between their parents.
7. Instead of being threatened by my children's good relationships with their other parent, maybe I actually have a vital interest in supporting those relationships.
8. Maybe my failure to acknowledge and deal with my grief has helped drive our conflict.
9. Maybe we can succeed only by partnering to protect our children.
10. Maybe our children require us to have even better cooperation now that we're separated.
11. Maybe my co-parent's slips are reason for me to be heroically restrained, not to add to conflict.
12. Maybe the failure of our intimate/marital relationship is no predictor of failure in our co-parenting.

Indeed, the best family attorneys seem to recognize that their chief function may be correcting broad cultural misunderstandings about the true challenges in family crises—and then educating parents how they can successfully meet those challenges. And they recognize that this educational process must be sustained and consistent, as parents will not necessarily grasp these ideas on a single exposure.

“Knowing that clients will often follow our lead, we will consistently practice and model courtesy with all persons, including clients, family members, courts, and fellow counsel.”
St. Joseph County Family Attorneys' Pledge of Cooperation, 2004

III: The Better Attorney Decisions that Follow from these Insights

The schematic above and the appreciation of the necessary role of family professionals as educators shows that attorneys will likely help their clients in family mediation best by such measures as the following:

1. Conferring with the mediator and fellow counsel² before the mediation to develop a common plan in helping parents focus on their children's protection and the future rather than their claims against each other and the past.
2. Ending forays to court.³
3. Consistently modeling what the family itself needs, including courtesy, cooperation, and problem-solving—working with fellow counsel to help the family work.

² I follow Florida family attorney Shelly Finman's suggestion of using “fellow counsel” instead of the more traditional (and combative) “opposing counsel.”

³ All professionals should work to understand that so far as the parents' functioning is concerned, having them in court on one thing has them in court on everything.

4. Helping parents understand that likely they'll either win together or lose together, that their life interests didn't magically become nonmutual when they separated, and that a focus on children's interests usually leads to resolutions on all matters.
5. Avoiding "cross advocacy" (attempts to address and persuade the nonclient parent), and instead persuading one's own client to more courteously cooperative positions.
6. Putting nonthreatening and encouraging invitations to parents to think about better ways to relate and cooperate.
7. Openly and explicitly honoring parents' progress and heroism, including their focus on the children, the future, cooperation, and problem-solving.
8. Making children a focus, if not the dominant focus, including by (a) underscoring the dangers to children from parent conflict, (b) warning of the polarizing effects and other costs of adversarial proceedings, including trials, hearings, and custody evaluations, and (c) emphasizing parents' opportunity to improve their own circumstances by focusing on their children's needs.
9. Sincerely apologizing for any past advocacy that carried even the appearance of disrespect, cruelty, or criticism—and, in the right circumstances, absorbing fault for something that might still be driving parents apart.
10. Referring parents to problem-solving resources like www.UpToParents.org and, when necessary, counseling and co-parenting classes.

And for reasons the schematic above and the role of family professionals as educators also help to illustrate, the following measures should be scrupulously avoided:

- a. Any discourteous, demeaning, or personally critical behavior.
- b. Almost any statements (other than sincere compliments) directed to the nonclient.
- c. Chronicling past misdeeds.
- d. Making threats of future legal positions or actions or making the case about whose rights are superior or inferior.
- e. Expressing hopelessness. (I once heard Colorado psychologist Christine Coates astutely observe that family professionals' effectiveness turns in large part on their ability to carry hope for people who have lost theirs.)

- f. Using mediation as a time to forge or reinforce a sympathetic relationship with one's client by casting the client as a victim or the other parent as a victimizer. (An attorney's relationship with the client should be forged long before—and should be based on a demonstrated commitment to assisting the client and the client's family through a uniquely difficult time. It should not be based on hysterical attorney claims along the lines of, "Oh, Mr./Ms. Mediator, you just can't know what a beast that other parent is!" If venting is necessary, it should be the client's prerogative, not the attorney's—the attorney wasn't a partner in the marriage.)

IV: Conclusion

Dr. Timothy Onkka has observed that all family professionals share a common unseen client: *the future co-parenting relationship between the parents*. Indeed, that relationship will both dictate the quality of every family member's adjustment to the crisis and also be responsible for resolving hundreds of future issues not knowable for months and years to come. Perhaps in 20 years, it will be clearer to family professionals of whatever subspecialty that divorces are not so much the resolution of conflicting interests, but instead (1) the revelation that the parents' most important interests have never been more concordant and (2) the creation of that new child-focused relationship that will be replacing the marital bond that is grieved.

What will matter most to every member of the family will be the parents' ability to work constructively and courteously together—and for that new relationship to be palpably evident to their children.

My hope is that all attorneys will appreciate that they can assist their clients at family mediation best by—and perhaps only by—being part of a team to nurture that future co-parenting relationship. There are no more important or influential members on that team.